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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROY PHILLIP DeMOTT, TIM MEADE and JIM PORTERFIELD

Appeal 2008-3308
Application 10/617,923
Technology Center 1700

Decided: July 31, 2008

Before BRADLEY R. GARRIS, CATHERINE Q. TIMM, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1-6, 8, 10-20, 23, 26-40, 42, and 44-51. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

I. BACKGROUND

The invention relates to a composite material. The composite includes a nonwoven needled layer, an adhesive layer and a polymeric film layer. Claims 1 and 27 are illustrative:

1. A layered textile composite having a pile, the composite comprising:
 - (a) a nonwoven needled layer, said nonwoven needled layer being comprised of mechanically interlocked staple fibers, said nonwoven needled layer having a first pile-containing side and a second side opposite said first side;
 - (b) a binder material applied to said second side of said nonwoven needled layer, said binder material comprising an acrylic latex binder,
 - (c) an adhesive layer adjacent said second side of said nonwoven needled layer; and
 - (d) a polymeric film layer adjacent said adhesive layer.
27. A textile comprising:
 - (a) a nonwoven needled layer, said nonwoven needled layer being comprised of polymeric fibers, said polymeric fibers being selected from the group consisting of polyester fibers, polypropylene fibers, and mixtures thereof, at least a portion of said polymeric fibers comprising a flame retardant material, said nonwoven needled layer having a first pile-containing side and a second side opposite said first pile-containing side;
 - (b) an adhesive layer applied to said second side of said nonwoven needled layer; and
 - (c) a polyurethane film layer bonded to said nonwoven needled layer, said polyurethane film layer comprising an aromatic polyether.

The following grounds of rejection are subject to our review;

1. The rejection of claims 8 and 42 under 35 U.S.C. § 112, ¶ 1 as lacking written descriptive support;

2. The rejection of claims 1-6, 8, 10-16, 18-20, 26, 35-40, 42, and 44-50 under 35 U.S.C. § 103(a) as unpatentable over US 6,492,001 B1 issued on Dec. 10, 2002 to Rubin et al. (Rubin) in view of US 5,672,222 issued Sep. 30, 1997 to Eschenbach;
3. The rejection of claims 17, 23, 27-34, and 51 under 35 U.S.C. § 103(a) as unpatentable over Rubin in view of Eschenbach and further in view of US 2004/0058603 A1 published Mar. 25, 2004 to Hayes.

As the Examiner has withdrawn the rejection of claims 26 and 31 under 35 U.S.C. § 112, ¶ 1, we do not review that rejection (Ans. 3).

II. DISCUSSION

Written Descriptive Support for the Subject Matter of Claims 8 and 42

The Examiner rejects claims 8 and 42 as lacking written descriptive support because these claims require the presence of two binder materials (an acrylic latex binder and binder fibers) in the claimed composite which are disclosed in the Specification as alternatives to each other (Ans. 3-4).

Appellants contend that the original Specification provides support because it “presents various embodiments without limitation to the combination of features in those embodiments” (App. Br. 5; see also Reply Br. 5); that one of ordinary skill would readily recognize possession of the claimed subject matter because the Specification teaches the use of binder fibers in the batt in conjunction with a teaching that binder material may be sprayed onto a batt (App. Br. 6; Reply Br. 5-6); and the Examiner is reading the Specification too narrowly (App. Br. 6).

The issue is: have Appellants demonstrated that the Examiner reversibly erred in finding that the original disclosure would not have

reasonably conveyed to one of ordinary skill in the art that Appellants had possession at the time of filing a composite with both the claimed acrylic latex binder and fiber binders?

As a first matter, because Appellants do not present separate arguments for the claims, we select claim 8 to represent the issues on appeal. Claim 8 is dependent on claim 1. Claim 1 requires an acrylic latex binder applied to the second side of a nonwoven needled layer. Claim 8 requires that the nonwoven needled layer further comprise a second binder material comprising a low melt polyethylene fiber or a bicomponent polyester fiber.

The test for determining compliance with the written description requirement of 35 U.S.C. § 112, first paragraph, is whether the disclosure of the application as originally filed would have reasonably conveyed to one of ordinary skill in the art that the inventor had possession at that time of the later claimed subject matter. *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991). The subject matter of the claims need not be described identically or literally for the application to satisfy the written description requirement of 35 U.S.C. § 112, first paragraph. *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983). However, the description of the invention must be sufficiently clear that one of ordinary skill in the art would have recognized from the disclosure that the applicants invented the later claimed subject matter. *In re Wertheim*, 541 F.2d 257, 262 (CCPA 1976).

In paragraph 28, the Specification characterizes “lower melt polyethylene fibers” as useful as a binder material which acts to hold the fibers together within the nonwoven needled layer 28. In the next paragraph, the Specification states that

In another application of the invention, a latex binder could be employed in which an acrylic co-polymer is used with a bromine-containing or a phosphorus-containing material to be applied as a flame retardant coating applied by applicator 25 shown in Figure 1. Thus, as a *second method* of employing binder material, *instead of* using low melt fibers, an acrylic co-polymer composition could be sprayed using the applicator 25 directly upon the surface of the nonwoven needled layer 28.

(Spec. ¶ 29, emphasis added).

The above disclosure in the Specification unequivocally states that the acrylic latex binder is an alternative to the low melting fiber binder. We find nothing in the Specification, including in paragraphs 18 and 19 relied upon by Appellants, which suggests the use of the two binders together. In view of the unequivocal statement in the Specification, we find that the original written description would not have reasonably conveyed to one of ordinary skill in the art that the Appellants had possession of a composite in which both binders were used together. Moreover, the above reproduced portion of the Specification identifies only low melt polyethylene fibers as a binder material. We find no discussion in the original Specification of using bicomponent polyester fiber as a binder material; only original claim 8 identifies those fibers as useful in a binder material and then not in conjunction with acrylic latex binder.

The question of whether one of ordinary skill in the art would readily recognize that the binder fibers and acrylic latex binder *could* be used together is not a question we need address here. The test is not whether one of ordinary skill in the art would find the invention obvious after reading the disclosure; it is whether the disclosure itself conveys that Appellants had possession of the later-claimed subject matter. A disclosure that merely

renders the later-claimed subject matter obvious is not sufficient to meet the written description requirement; the disclosure must describe the claimed invention with all its limitations. *Tronzo v. Biomet, Inc.*, 156 F.3d 1154, 1158 (Fed. Cir. 1998). “That a person skilled in the art might realize from reading the disclosure that such a step is possible is not a sufficient indication to that person that the step is part of appellants’ invention.” *In re Barker*, 559 F.2d 588, 593 (CCPA 1977) (quoting *In re Winkhaus*, 527 F.2d 637, 640 (CCPA 1975)).

We find that Appellants have not demonstrated that the Examiner reversibly erred in finding that the original disclosure would not have reasonably conveyed to one of ordinary skill in the art that Appellants had possession at the time of filing a composite with both the claimed first and second binders. We, therefore, sustain the rejection of claims 8 and 42 as lacking written descriptive support under 35 U.S.C. § 112, ¶ 1.

Obviousness over Rubin and Eschenbach

The Examiner rejects claims 1-6, 8, 10-16, 18-20, 26, 35-40, 42, and 44-50 under 35 U.S.C. § 103(a) as unpatentable over Rubin in view of Eschenbach.

All of the rejected claims require the presence of an acrylic latex binder on the second side of a nonwoven needled layer (see claims 1 and 35). The Examiner finds that Rubin describes a fabric which may be a nonwoven treated with a fluorochemical that is preferably a latex composition (Ans. 4). The Examiner acknowledges that Rubin does not disclose that “the acrylic latex binder is applied to the second side (only)” (Ans. 5) but interprets the claims such that the “second side” application is a

method step that does not require that the binder remain on the second side, i.e., the product is not limited to having an acrylic latex binder only on the second side (Ans. 5-6). Alternatively, assuming that the claim is limited to the presence of the acrylic binder only on the second side, the Examiner applies Eschenbach for its teaching of a latex back coat applied to one side of a needle punched nonwoven and concludes that “it would have been readily obvious to modify the binder application and location of Rubin with the teachings of Eschenbach in order to stabilize the nonwoven fabric.”

(Ans. 6.) The Examiner then acknowledges that Eschenbach does not disclose that the latex backcoat is acrylic, but gives Appellants Official Notice that “acrylic latexes are well known in the art of latex binders.” (Ans. 6.) The Examiner then concludes that it would have been obvious to one of ordinary skill in the art “to employ an acrylic latex for the SBR latex of Eschenbach.” (Ans. 6.)

In the Examiner’s first basis of rejection, it appears that the Examiner is relying upon the fluorochemical composition of Rubin as the acrylic latex binder of the claims. However, the Examiner does not point to anything within Rubin indicating that the fluorochemical latex is an acrylic latex. Therefore, the evidence does not support the Examiner’s first rationale.

Nor do we find that the evidence supports the Examiner’s alternative basis for rejection which relies upon Eschenbach in addition to Rubin. It is not clear why one of ordinary skill in the art would “modify the binder application and location of Rubin [i.e., the location and application of the fluorochemical treating agent which provides water repellency, water resistance, and stain resistance] with the teachings of Eschenbach [i.e., the teaching of applying a latex backing] in order to stabilize the nonwoven

fabric. The two materials, the fluorochemical agent and the latex backing, have different functions and properties.

Rubin describes a fabric treated with a fluorochemical and backed through an adhesively adhered polymeric film that renders the fabric more completely water resistant, but does not interfere with the hand and feel of the fabric (Rubin, col. 6, ll. 4-11). Eschenbach describes a fabric (needled nonwoven with batt 14 and loops 18) with a backing 24, such as a coating of latex applied by an applicator 25 (Eschenbach, col. 2, ll. 49-52, Figs. 1 and 6). The purpose of the backing is to lock the fibers in the batt and add stiffness (Eschenbach, col. 2, ll. 52-55). The Examiner has not explained why one of ordinary skill in the art would have incorporated the latex backing 24 into the treated textile fabric of Rubin such that the product would have the latex backing taught by Eschenbach in addition to the adhesive layer and polymeric film backing taught by Rubin.

Therefore, we do not sustain the rejection of claims 1-6, 8, 10-16, 18-20, 26, 35-40, 42, and 44-50 under 35 U.S.C. § 103(a).

Obviousness over Rubin, Eschenbach, and Hayes

The Examiner rejects claims 17, 23, 27-34, and 51 under 35 U.S.C. § 103(a) as unpatentable over Rubin in view of Eschenbach and further in view of Hayes.

With respect to claims 17, 23, 32-34, and 51, Hayes does not cure the deficiency in the rejection explained above. Therefore, we do not sustain the rejection of those claims over Rubin, Eschenbach, and Hayes.

Claims 27-31 stand on a different footing. Those claims do not require an acrylic latex binder.

As a first matter, we select claim 27 to represent the issues on appeal as Appellants argue claims 27-31 as a single group (Br. 18-19).

The Examiner finds that Rubin teaches a fabric which may be woven, nonwoven, or other types of fabric, adhesively adhered to a polymeric backing (Ans. 4-5). The Examiner acknowledges that Rubin is silent as to the specific construction of useful nonwovens, but finds that needle punched nonwovens were well known in the art, taking Official Notice of such fact, but also offering Eschenbach as evidence of such (Ans. 5). The Examiner concludes that “one skilled in the art would have been able to select a needlepunched nonwoven, with or without a pile side, as the nonwoven construction for the Rubin invention since said nonwovens are common in the art and since pile fabric are desirable for certain applications.” (Ans. 5.)

Appellants contend that “[t]he Office Action has not identified any teaching, suggestion or motivation in the cited art to alter Rubin to instead use a pile-surface material, other than the fact that such materials are generally known.” (App. Br. 18.) According to Appellants, “the rejection appears to be based exclusively on what would have been within the capabilities of one skilled in the art in the modification of Rubin,” but there must be “some objective reason to combine the teachings of the references,” and “the Office Action has not provided any such objective reasoning.” (App. Br. 19).

The issue is: have Appellants shown that the Examiner reversibly erred in finding a reason to select a known needle punched nonwoven, such as that described by Eschenbach, for use in the treated textile fabric of Rubin?

We answer this question in the negative.

Rubin describes a treated textile fabric for such applications as seating upholstery (Rubin, col. 1, ll. 21-24). Rubin provides a water resistant, water repellant stain resistant fabric that does not feel like plastic by treating the fabric with a fluorochemical composition and backing the fabric with a polymeric film (Rubin, col. 2, ll. 43-51). The type of fabric selected is not particularly limited. Rubin, in fact, states that “fabrics useful in the present invention include, but are not limited to, woven, non-woven and knitted fabrics.” (Rubin, col. 2, ll. 60-64). There is no question that needle punched nonwoven fabrics were known at the time of the invention. Eschenbach clearly teaches that such fabrics were known, including those with pile surfaces (Eschenbach, col. 1, ll. 13-55). Given that Rubin does not particularly limit the fabric material and Eschenbach discloses that needle punched fabrics with pile surfaces were known in the art, the evidence supports the Examiner’s conclusion of obviousness. One of ordinary skill in the art would have used the known material for its known properties with the predictable result of obtaining a water resistant, water repellant, and stain resistant backed fabric with the hand and feel of the pile of a needle punched nonwoven. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007).

Appellants have not shown that the Examiner reversibly erred in finding a reason to select known needle punched nonwoven, such as that described by Eschenbach, for use in the treated textile fabric of Rubin.

Appellants do not point out any deficiency in the Examiner’s application of Hayes. Therefore, a discussion of Hayes is not necessary to our decision.

We sustain the rejection of claims 27-31 over Rubin, Eschenbach, and Hayes.

III. CONCLUSION

In summary,
we sustain the rejection of claims 8 and 42 as lacking written descriptive support under 35 U.S.C. § 112, ¶ 1;
we do not sustain the rejection of claims 1-6, 8, 10-16, 18-20, 26, 35-40, 42, and 44-50 under 35 U.S.C. § 103(a) over Rubin and Eschenbach;
we do not sustain the rejection of claims 17, 23, 32-34, and 51 over Rubin, Eschenbach, and Hayes; and
we sustain the rejection of claims 27-31 over Rubin, Eschenbach, and Hayes.

IV. DECISION

The decision of the Examiner is affirmed-in-part.

V. TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal maybe extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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Application 10/617,923

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